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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of : Shane E. Weyant, et al.  
Serial No. : 10/619,131  
Filed : July 14, 2003  
For : WALE AND REATINING WALL SYSTEM  
Group No. : 3671  
Examiner : T.L. Mayo

**MAIL STOP AF**

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Sir:

**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

Applicants request review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a notice of appeal.

**STATUS OF THE CLAIMS**

Claims 1, 2, 4-7 and 28-34 are pending in the present application.

Claims 1, 2, 4-7 and 28-34 have been rejected.

**REJECTION UNDER 35 U.S.C. § 102**

Claim 28 was rejected under 35 U.S.C. § 102(e) as being anticipated by Rainey (US 6,168,351). The Applicants respectfully submit that the Rainey reference does not teach each and every limitation of the claimed invention.

The Applicants respectfully submit that those elements of Rainey as identified in the final Office Action fail to disclose a wale that "is of a unitary construction" as recited in Claim 28 and described in Applicants' application. As shown in Figures 2 and 4 of Rainey, and described therein, the back wall 48, front wall 50 and plurality of connecting walls 44, 46 (identified in the final Office Action as the back wall, front wall and connecting walls of Applicant's wale) form an attachment mechanism 42 that is used to attach the

tieback system to a horizontal course member 16. This attachment mechanism 42 includes two separate force distribution members 44, 46 and two separate flanged washers 48, 50. Rainey, Col. 3, lines 49-51, 61-63. As a result, the attachment mechanism 42 and its four elements are not of a unitary construction, but are separately constructed members. Though assembled into a unit, as argued in the Office Action, the unit is not of unitary construction as contemplated and described in Applicant's specification. See, Specification, page 3, paragraph 0010; page 5, paragraph 0031; pages 10-11, paragraph 0057. Applicants respectfully submit that an ordinary person of skill in the art would understand that the identified elements of Rainey (identified in the final Office Action as the wale) together are not "of a unitary construction."

With respect to the Examiner's position, Applicant submits that the "prior art wale" identified in Rainey is actually an "attachment mechanism" constructed of multiple and separate members – not a wale as contemplated by the Applicants. It appears that the Office Action is attempting to define the attachment mechanism 42 to be - and function as - a "wale," when Rainey in fact teaches that it is and functions as an attachment mechanism. Second, Claim 28 recites that the "wale is of unitary construction" – not simply "unitary". Thus, Rainey's attachment mechanism 42 (including two members 44, 46 and two flange washers 48, 50) may arguably be a "unit" - when viewed as a whole - but it is not "of unitary construction."<sup>1</sup>

### **REJECTIONS UNDER 35 U.S.C. § 103**

Claims 1, 2, 6, 28, 30, 33 and 34 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Weber (US 5,435,669) in view of Fox (US 5,765,970). Claims 4, 5, 7, 31 and 32 were rejected 34 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Weber (US 5,435,669) in view of Fox (US 5,765,970) and, further in view of *Enduro Systems DuroThread Fastener and Hanging Systems* ("Enduro").<sup>2</sup> The Applicants respectfully submit that these claims are not obvious in view of the proposed combination of these two references.

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<sup>1</sup> Claim 28 was also rejected under 103(a) as being unpatentable over Rainey. For the same reasons, Claim 28 is not obvious over Rainey.

<sup>2</sup> With respect to the rejection of dependent Claims 4, 5, 31 and 32, the Enduro reference is simply not relevant. This reference fails to disclose, teach or suggest any application to retaining walls and wales. At most, the reference discloses threaded bolts, nuts and washers made of non-metallic material, and fails to relate to a wale comprising composite material, as claimed in Applicant's claims. Therefore, the Office Action has failed to establish a prima facie case of obviousness of Claims 4, 5, 31, and 32.

Independent Claims 1 and 6 recite several walls/members that form a plurality of chambers within the wale. In addition, independent Claims 1, 6 and 28 also recite a channel (or channel portion) having a depth sufficient such that when the wale is secured to the retaining wall by a tieback rod passing through said wale and a fastener, the tieback rod and said fastener do not protrude from the channel (or channel portion). Claims 1 and 6. The final Office Action concedes that Weber fails to disclose such elements.

Weber teaches hollow polymeric elongate lagging members that are stacked in a horizontal disposition to form a wall. Weber, Col. 1, lines 10-24, lines 51-52. The lagging or panel members (87, 74) of Weber are horizontal construction members, and these members are not used for bracing the vertical members. In fact, the panel members (87, 74) are designed and used to form the retaining wall panels themselves (extending horizontally lengthwise), which are inserted into the vertical pilings. See, Abstract; Figure 1. In addition, Weber provides small weepage holes in the horizontal wall member (87, 74) because it is desirable for a uniformly constructed wall, such as a wall constructed from the wall members (87, 74), to address water weepage. Thus, it is clear that the wall members (87, 74) of Weber are used to construct the wall itself, and do not and are not intended to function in Weber as a conventional “wale” member.<sup>3</sup>

Fox is directed to hollow timbers of various lengths with the timbers placed on top of each other (lengthwise) to form a wall. Fox, Col., 1, lines 5-36. Vertical whaler posts are provided and the horizontal timbers are held to the whaler posts with U-clips. Fox, Col. 1 lines 44-55. The wall member timbers 12 of Fox constitute the wall portions. It is apparent that Fox’s vertical whaler posts 44 stabilize and brace the retaining wall 10. Similar to Weber, Fox’ design and method of connection of the retaining wall is substantially different from Applicant’s description - as Fox’s panel members 12 form the wall, and the vertical whaler posts 44 brace and connect to the retaining wall 10. The final Office Action identifies the timbers 12 as corresponding to Applicant’s wale. Fox’s timbers 12 do not include (1) a channel (with sufficient depth) or (2) the recited channel extending from a first end to a second end of the invention.

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<sup>3</sup> Weber does describe using tie-back cables in conjunction with tie-back lagging members 184 but these tie-back lagging members still form part of the main wall portion and do not include either (1) a channel extending from a first end to a second end of the member, or (2) that this recited channel has the channel depth, as recited in Applicant’s claims (as amended). Weber, Figures 17, 18, Col. 12, line 27 through Col. 13, line 39.

The final Office Action ignores these noted deficiencies of both Weber and Fox, and simply argues that (1) since Fox teaches reinforcing “ribs” in the wall panels, it is obvious to include them in the lagging wall members 14 of Weber, and (2) the channel structure recited in Applicants’ Claims 1, 6 and 28 constitutes merely a change in size of the lagging wall members 14 of Weber. The teachings of Weber and Fox, and the elements identified by the Office Action, are directed to actual wall panels – the wall members that constitute the wall. No teaching or motivation has been provided to support the argument that Weber’s or Fox’s teachings translate to wales. None of Weber’s lagging members 14 are taught as being connected to a tieback rod (as Weber teaches vertical piles to support the wall members). Thus, no reinforcing walls would seem to be necessary for Weber’s lagging members 14. In contrast, Applicants teach utilization of reinforcing walls in a wale to handle loads exerted on the wale by a tieback rod. In the single instance where Weber does describe using tie-back cables in conjunction with a tie-back lagging member 184, this member appears to be specially formed, but this special lagging member still forms part of the main wall portion – and **does not** include either (1) a channel extending from a first end to a second end of the member, or (2) that this recited channel has the channel depth, as recited in Applicant’s claims (as amended). Weber, Figures 17, 18, Col. 12, line 27 through Col. 13, line 39.

Therefore, as noted above, it does not seem plausible that Fox would teach adding reinforcing members to the non-tied back lagging members 14 (see above) or that Applicant’s recited channel dimensions and structure would be obvious in the lagging members 14. At most, if Fox teaches adding this element to the special tie-back lagging member 184, then the combination still does not recite all of the elements recited in Applicant’s claims. In fact, the “channel” in Weber’s special lagging member 184 is shown with a fastener extending outside the channel. Additionally, this channel is not shown as extending along from a first end to a second end of the member. Thus, the combination fails to produce a device with all recited elements. Applicants respectfully submit it is not obvious to combine Fox and Weber, and even if it is, such combination would not yield Applicant’s claimed invention.

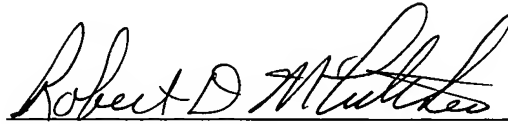
As a result of the foregoing, the Applicants assert that the remaining Claims in the Application are in condition for allowance, and respectfully request allowance of the Claims. The Commissioner is hereby authorized to charge any additional fees connected with this communication or credit any overpayment to Munck Butrus Deposit Account No. 50-0208.

Respectfully submitted,

MUNCK BUTRUS, P.C.

Date: \_\_\_\_\_

5/11/2006



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